IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 164 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

PREMILABEN ISHWARLAL RAIJADA

Versus

ORIENTAL INSURANCE COMPANY LTD

Appearance:

MR YS LAKHANI for Petitioner

MR UDAY R BHATT for Respondent No. 1

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 12/08/97

CAV JUDGEMENT

1. This CRA is directed against the judgment and order of MACT(Main) at Rajkot dated 21/9/93 arising from the execution proceedings for executing the above order. It appears that the MACP No.109/90 instituted by one D.P.Dholakia before the tribunal at Rajkot. In the accident two vehicles were involved one being the Fiat Car which was not insured as required under the

provisions of the Motor Vehicles Act and another vehicle being Autorickshaw which was insured with the Oriental Insurance Co.Ltd. The claim of the claim of the claimant was partially passed by the tribunal interalia holding that he was entitled to recover amount of Rs.43,000/with 12% interest from the date of the application till realisation and proportionate costs of the petition from the present petitioner who was the original opponent travelling in the Fiat Car and from opponent Nos 3 & 4 jointly and severally. Though it is stated in the memo of CRA that the judgment and award of the tribunal will be produced before the court at the time of hearing it must be stated that the same is not produced. The driver and owner of the Fiat car one of them being the present petitioner was found to have contributed to the accident that occurred and finding of the tribunal was that there was contributory negligence of the petitioner, namely, Pramilaben Ishwarlal Raijada who was the owner of the Fiat car. The liability of the driver of Autorickshaw and the Insurance Company was held to the extent of 75% and therefore the Oriental Insurance Co.Ltd, opponent herein, was held to be liable to pay or discharge its liability to the extent of 75%. Unfortunately, without reading the award and knowing that the liability of the Oriental Insurance Co.Ltd which insured the autorickshaw was held to the extent the extent of 75% only and the tribunal has recorded a positive finding that it was a case of contributory negligence where but for the negligence of the owner and the driver of the Fiat car, present petitioner , no accident would have occurred, the tribunal passed the award for the aforesaid amount holding that the present petitioner and opponent Nos 3 & 4 were jointly and severally liable. The liability of the owner and driver of autorickshaw for the accident was assessed at 745% and to that extent the Insurance Company present opponent herein was liable to deposit 75% of the amount awarded. The tribunal has in terms found that it is a case of contributory negligence of the two vehicles and therefore the Insurance Co. which insured the autorickshaw , whose contributory negligence was assessed at 75% was thereby to deposit the amount of award, costs and interest to the extent of 75% only. Unfortunately, the opponent herein namely the Oriental Insurance Co with whom the autorickshaw was insured deposited the full amount of award though the liability of the vehicle insured with it was assessed at 75% only. In fact, therefore, the Insurance Co was liable to deposit the amount to the extent of 75% of the award with costs and interest. Since the full amount was awarded the claimant withdrew the full amount from the tribunal and the mistake was detected by the Senior Divisional Manager of

the Oriental Insurance Co., present opponent, and application was made to recover the excess amount under section 110E of Motor Vehicles Act as it stood prior to the amendment of the Act which is equal to Section 174 of the Motor Vehicles Act, 1988. After examining the application same was admitted by the tribunal and notice was issued to the opponent and below such application in the Darkhast Proceding No.7/94 the tribunal passed the judgment and order, dated 21.9.93 allowing the application and calling upon the Insurance Company, owner and driver of the vehicle to pay to the Orinental Insurance Co. amount of Rs.14,096.25ps within two months from the date of the order.

2. Being aggrieved by such judgment and order of the tribunal, the present CRA is preferred by the owner of the Fiat car whose liability was assessed at 25% and whose vehicle was admittedly not insured as per the requirements of law. Since the owner of the Fiat car was called upon to pay the amount to the extent of 25% of the total amount awarded, it has preferred the present CRA challenging the judgment and award of the tribunal. It shall have to be kept in mind that the driver and owner of the vehicle vehicle having been found to have contributed to the vehicular accident to the extent of 25% the owner of the Fiat car has come forward stating that since the liability was said to be joint and several even if the liability was assessed at 75% for rickshaw and 25% for the Fiat car it was not liable to refund the amount or redeposit the amount in the tribunal. It failed to deposit the amount of its share and therefore the claim for the full amount of Rs.56385/- though it ought to have been 25% lesser because to the extent the owner and driver of the Fiat car was held to have contributed towards their share.

3. Mr.Y.S.Lakhani, Ld.counsel appearing for the petitioner, who is the owner of the Fiat car has placed reliance on present section 174 of the Motor Vehicles Act, 1988 which is comparable with section 110E of the Motor Vehicles Act which stood repelled by the present Act. Both the provisions i.e. Section 110E of the old Act and section 174 of the new Act are put in juxtaposition in the tabular form herein so that the contention of the Ld.advocate appearing for both the parties can be well appreciated in their proper perspective.

Section 110E	Section 174
Recovery of money from Insur-	Recovery of money from

er as arrears of land revenue:	Insurer as arrears of land revenue:
Where any money is due from any person under an award the Claims Tribunal may, on an application made to it by the person entitled to the money, issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrear of land revenue.	Where any money is due from any person under an award the Claims Tribunal may, on an application made to it by the person entitled to the amount, issue a certificate for the amount to the Collector and the Collector shall proceed recover the same in the same manner as an arrear of land revenue.

4. It is not disputed that the present petitioner Pramilaben Ishwarlal Raijada is the owner of the Fiat Car bearing Reg.No.GJT 8147 and the said Fiat Car was not insured at all on the date of the vehicular accident. It is also not disputed that the liability of the driver and the owner of the Fiat Car, present petitioner was to the extent of 25% and but for their contributory negligence of 25% the accident would not have occurred. The owner and the driver of the Fiat Car however did not deposit any amount but unfortunately the Insurance Co of Autorickshaw the respondent herein deposited the total amount of the award being amount of Rs.56,385/-. It was not liable to pay the full amount. Its liability was specifically determined to the extent of 75% only as the owner and driver of other vehicle has contributed to the extent of 25% and to that extent the respondent-Company was not required to deposit the full amount. The present petitioner was served with the notice, but since the full amount was already recovered by the claimant she chose not to appear nor was the amount of 25% which was held to be its liability was deposited.

5. In the final award of the tribunal, dated 24.3.92 it is clearly found in its finding on issue No.1 that the vehicular accident occurred on account of contributory negligence on the part of the present petitioner (who was opponent No.1 herein) to the extent of 25% and also because of negligence which was assessed to the extent of 75% of the autorickshaw driver and owner. The application of the Oriental Insurance Co with whom the autorickshaw was insured to recover the amount to the extent of 25% back ultimately is granted by the tribunal calling upon the present petitioner to deposit the amount

of Rs.14,096.25/ It is such order which is under challenge before this court. Mr.Y.S.Lakhani, Ld.advocate appearing for the petitioner--i.e. the owner of the Fiat car which was not at all insured and whose liability for the accident was fixed at 25% and when finding was recorded that there was contributory negligence of the driver of the Fiat Car, the Insurance Company of the Autorickshaw was not required to deposit the full amount, but unfortunately, either ignorance of law or because of the fact that no full amount was deposited it deposited the full amount as the tribunal has held liability to be joint and several liability. The question therefore that would arise before this court is that whether the owner of the Fiat car which was not at all insured and was thus himself a wrong doer was entitled to recover 25% of the amount of the award from the Insurance Co of the Autorickshaw or whether he was liable to refund the said amount as the liability of the owner and the driver of the vehicle was held to be 25% of and the said liability was rightly described by the tribunal as contributory negligence. In reply to the application the owner of the Fiat Car has submitted detailed written statement at Exh.16. The main contention which is raised is that either under section 110E of the Motor Vehicles Act, 1939 or under section 174 of the Motor Vehicles Act, 1988 the tribunal can not recover the excess amount which is paid by the Insurance Company and that the party shall have to file civil suit it being the money claim for the recovery of the amount. On the other hand, the contention of the Ld.Advocate for Oriental Insurance Co. with whom the autorickshaw was insured is that since its liability was held to be to the extent of 75% only the excess amount deposited was liable to be refunded to the Insurance Company and that it was not liable to file money suit as if it was a suit for amount due and payable by the other side to the Insurance Company.

6. One important aspect of law of Joint Tort-feasors shall have to be kept in mind. When there are two joint tort-feasors and the liability of each tort-feasor is said to be contributory and the extent of said liability is also determined, it is the case of contributory negligence, but for whose negligence accident would not have occurred in the manner it has occurred or would have be averted. In fact, in such cases, the liability of the second joint tort-feasor shall have to be joint and several, but the liability is several liability as assessed by the tribunal. The vehicular accident has occurred because of contributory negligence of the fiat car to the extent of 25% and the contributory negligence of the rickshaw to the extent of 75%. It is undoubtedly

a case of contributory liability and not liability which was liability of one party only. Both the parties have contributed to the negligence, and therefore, at the most, to the extent of liability the party is liable to reimburse the victim or the injured person. The concept of contributory negligence and joint and several liability is well discussed in the Law of Torts by Winfield and the author has found that in case of negligence that occurs because of contributory negligence, the liability of both the parties is joint liability only and not several liability. In fact the liability which is several and therefore to the extent of negligence found on the part of the owner/driver of the vehicle, the liability is several.

7. Winfield on Tort, 9th edition in Chapter 26 deals with joint an several tort-feasor. On page 556 under the heading "Joint and Several Tort-feasor" the law as it existed earlier is stated. On page 557 it is stated that at common law the general rule was that a joint tort-feasor, even though he had satisfied the plaintiff's claim against him in full, could recover neither an indemnity nor a contribution towards his liability from any other joint torgfeasor.This harshness of common law rule has been modified. After discussing the modification which is effected by Law Reform (Married Women and Tort-feasor) Act,. 1935, the author has referred to the right to contribution. By referring to the provisions of said Act the author has observed that the Act gives the right to contribution to any tort-feasor who is liable in respect of the plaintiff's damage, and it is given to him only against another tort-feasor who is, or would if sued have been, liable in respect of the same damages, whether as a joint tort-feasor or otherwise. The liability of contribution between tort-feasor is not itself a right of action in tort. The word "liable" as used in describing one tort-feasor as "held liable", i.e. sued to judgment successfully, or presumably that he has rightly accepted liability by admission or payment without an action being brought against him. Where the word is used to describe another tort-feasor from whom the contribution may be recovered "liable" means "held liable' and if a person has been sued to judgment and held not liable then no contribution may be recovered from him. However, when another person is held to be liable as one its contribution to negligence, the liability is determined by specifically apportioning the liability. In such cases, the joint tort-feasor whose liability is ascertained as in the present case, namely, Fiat car owner/driver to the extent of 25% the liability having

been specifically apportioned, he does not become entitled to recover the full amount from the Insurance Co of another vehicle because the liability of the driver/owner of that vehicle is already specifically apportioned, namely 75%. In such case, therefore, the reference to section 174 of the present Act is not permissible because though the liability is found to be contributory, the tribunal has in terms fixed the contribution of the driver/owner of the vehicle and to the extent of that contribution the owner/driver of the Fiat Car can not recover the full amount from the owner/driver of the other vehicle, i.e. autorickshaw. In view of the aforesaid position of law and the observations made by S.P.Barucha (As his Lordship then was of the Bombay High Court) it must be held that the excess amount which is deposited by the Insurance Co of another vehicle shall have to be refunded to the Insurance Co and the order passed by the tribunal shall have to be upheld.

8. Mr.Y.S.Lakhani, Learned advocate appearing for the petitioner--owner of the Fiat Car has disputed the order passed by the tribunal and submitted that since the full amount was already deposited by the other Insurance Co. section 174 of the present Act would operate and that the owner of the fiat car can not be called upon to refund the amount which the claimant has recovered.

9. If one refers to the language employned in Section 174 of the present Act, it shall have to be seen that it is captioned as "Recovery of money from insurer as arrear of land revenue". The said section provides that "where any amount is due from any person under an award, the Claims Tribunal may, on an application made to it by the person entitled to the amount, issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrear of land revenue'. The question which is required to be first determined is as to whether any amount is due from the owner and the driver of autorickshaw which was insured with the Oriental Insurance Co.Ltd. The answer is that the amount due was only to the extent of 75% of the award and that the amount was already paid or deposited by the Insurance Co. The full amount which is deposited by the Oriental Insurance Co. can not be said to be amount which was due from the Insurance Co under the award to the owner of the Fiat car. Secondly, the tribunal is to be moved on an application by the person entitled to the amount. Now surely, the present petitioner who is the owner of the fiat car whose liability was assessed to the extent of 25% and which

fiat car was not at all insured can not be said to be a person entitled to excess amount which it has recovered. In my opinion, section 174 of the present Act therefore has no application to the fact situation which obtained before the tribunal, and the tribunal justly, rightly and legally reached the decision.

10. Mr.Lakhani very vehemently submitted before this court that the words "any person" occuring in the first part of the phrase in Section 174 namely "where any amount is due from any person under an award" is misinterpreted by the tribunal. According to Mr.Lakhani, the word "any person" is required to be properly interpreted and this is in fact interpreted in favour of the owner of the Fiat car by other High Courts. The Ld.counsel placed reliance upon the decision of the Bombay High Court reported in the case of ORIENTAL FIRE AND GENERAL INSURANCE CO.LTD vs BNALAKRISHNA RAMCHANDRA NAYAN 7 ORS reported in 1983 ACJ 38 as well as the case of .K.GOPALAKRISHNAN vs SANKARANARAYANAN 7 Ors reported in 1969 ACJ 34. Turning now to the decision of the Madras High Court reported in 1969 ACJ 34 it shall have to be kept in mind that two vehicles were involved , one was the lorry and the other was the scooter. It was found that when the lorry reached the middle of the cross roads, the scooter came from its right side and struck the lorry. However, the tribunal found that it would not absolve the driver of the lorry of his liability. He should have slowed the vehicle and given way to the scooter which entered the cross roads from his right side. The tribunal also found that however it was wrong on the part of the scooterist to contend that since he had right of way, it was not necessary for him to keep a look out for the vehicles approaching the crossing from his left. It was in this situation, that question arose of determining the liability. In the context of section 110E of the Motor Vehicles Act, 1939 the tribunal took a view that though the liability was assessed, the tribunal has no power to enforce its award against the driver/owner of the vehicle, but the claimant can file suit on the basis of the award as a debt and that such suit would not be barred by the provisions of section 110F of the Act which is equal to Section 175 of the present Act which deals with bar of jurisdiction of civil court. The tribunal found that in case of contributory negligence, the common law rule that tort feasors are jointly and severally liable to pay compensation to the person injured , without apportionment, has been modified in England by a statute, namely, Married Woman and Tort-feasors Act, 1935, and therefore, the English

decision on that point can not be followed. In the opinion of the tribunal, the courts in India would act on the principles of equity, justice and good conscience in matters which are not covered by any statute and rely upon the principles established under the English law to find out what the rule of justice, equity and good conscience is. However, every statutory amendment made in England can not be made applicable to the liability arising from the contributory negligence of joint tortfeasors.

11. In the case of Oriental Fire & General Insurance Co.Ltd vs Balakrishna Ramchandra Nayan and tohers(supra) the Division Bench of the Bombay High Court to which Hon'ble Justice S.P.Bharucha (as His Lordship then was) was a party the question arose of interpreting section 110E of the old Act which is equal to Section 174 of the present Act. In the case before the Division Bench of the Bombay High Court unfortunately the tribunal which made the award did not specify the amount to be paid under the award by the insurer, the owner and driver of the vehicles involved. Undoubtedly, two vehicles were involved. Insurance Co paid the entire amount due under the award. In that fact situation, it was held that apportionment of liability between the parties is the function of the tribunal. Recovery of amount paid in excess of its liability by one opposite party from another opposite party is governed by section 110E of the old Act and the only remedy is the recovery of moneys due under the award. When the insurer made payment under the award larger than the limited liability it was held that the remedy was to move the civil court. However, in my opinion, it would be just and proper to refer to the judgment and award of the tribunal before the Division Bunchy of Bombay High Court. The tribunal found that it was a case of contributory negligence and there was negligence of the driver and owners of other vehicle also, but unfortunately, it did not decide the extent of contributory negligence. The insurance company of one of the vehicles thereupon deposited the full amount without calling upon the driver to determine the extent of contributory negligence of the driver/owner of the vehicle which was insured with it. In such a fact situation, the observations made by the Division bench of the Bombay High Court could be well appreciated but in my opinion in paras 15 & 17 of the reported judgment what is observed by His Lordship S.P.Bharucha on behalf of the Division Bench is very pertinent and is required to be closely noted. In para 15 , the Division Bench made following observations:

"It will be observed that the tribunal is required in making the award to specify the amount to be paid thereunder by the insurer, the owner and the driver of the vehicle involved. Apportionment of liability between them is a function of the Tribunal and the apportionment is a part of the award. The recovery of the amount paid in excess of its liability by one opposite party from another opposite party is, then, the recovery of moneys due under an award and section 110E is attracted. It must also be noted in this connection that section 110E refers to moneys due from any person under an award. It is, therefore, not correct to say, as the tribunal did, that the tribunal does not have the power to issue a certificate under section 110E to recover moneys due by one opposite party from another opposite party".

12. It is thus clear that it is for the tribunal in case of conrtributory negligence to specify the amount to be paid therein by the insurer to the driver or owner of the vehicle involved. Apportionment of liability between them is the function of the tribunal and the apportionment is a part of the award. Thereupon, the contention of the other side was noted to the effect that before the tribunal the appellants had not raised the plea that their liability was limited before the tribunal. The Ld.advocate submitted before the Division Bench of the Bombay High Court that the tribunal would have apportioned the liability and would have given an award under which the liability of the respondent could have been determined and the liability in that case could be said to be several liability. Since the tribunal omitted to do it, the Insurance Company could not have been compelled to pay under the award the amount larger than the amount of its liability. Dealing with this contention in para 17 Justice Bharucha speaking for the Division Bench of Bombay High Court made following pertinent observations:

"Reference must be made to section 110F whereunder the jurisdiction of the civil courts is barred in respect of 'any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal'. It is necessary to lay stress on the words 'any question relating to any claim for compensation'. The determination of the

liability of a party and, therefore, the determination and recovery of the excess thereon paid by him under an award is such question, and its seizin by a civil Court is barred. The impugned order is erroneous insofar it refers the appellants to a civil suit to recover the excess amount."

13. The aforesaid observations made by His Lordship Justice Bharucha (as His Lordship then was) is direct answer to the contentions raised and it shall have to be held that the other party should not be compelled to file civil suit to recover the excess amount or one can not be called upon to recover the excess amount by following the procedure of obtaining recovery certificate from the Collector. It shall have to be kept in mind that even when section 110E of the old Act was in existence and operative and that was noted by the Division Bench and yet the aforesaid conclusion was reached. This decision rather than helping Mr.Lakhani goes against him and clearly decides that the determination of liability of a party is within seizin of the tribunal and the jurisdiction of civil court is barred. In fact the party which had made payment of excess amount namely the Insurance Co of autorickshaw in the present case can not be compelled to file civil suit to recover the excess amount. The conclusion which is reached by the Division Bench of Bombay High Court in para 17 is therefore complete answer to the submission made by Mr.Lakhani. In my opinion, the tribunal in the present case rightly interpreted the provisions of Section 110E of the old Act or section 174 of present Act. The tribunal in the present case has also found that the jurisdiction of the civil court is barred in such cases and that when the tribunal failed to specify the amount and to determine as to what was the contributory negligence of either party to vehicular accident the question of operation of section 174 would arise. Apportionment of liability between the parties is merely the function of the tribunal and the recovery of amount paid in excess of its liability by one opposite party from another party is itself not a matter of recovering the excess amount due under the award.

13. In view of the aforesaid position of law, in my opinion, the MACT at Rajkot was justified in allowing the application of the Oriental Insurance Co.Ltd and in

calling upon the owner of the Fiat car which was not at all insured to pay to the insurance company Rs.14,096.25ps within two months. The judgment and award of the tribunal being just and proper and in accordance with law is not required to be interfered with nor could it be said that the tribunal has committed any jurisdictional error which would call for interference of this court.

14. In the result, the CRA fails. The judgment and award of the tribunal is upheld. Rule is discharged.Interim relief is vacated. No costs.

15. It is stated at the Bar by Mr.Lakhani, Ld.counsel appearing for the petitioner that at the time of admission of the Civil Revision Application, an amount of Rs.5,000/- was required to be deposited as per the order passed by His Lordship J.M.Panchal,J. The said amount is already deposited before the trial court. The adjustment of the said amount shall be given by the tribunal while refunding the amount to the Oriental Insurance Co Ltd, and the amount is required to be refunded, after including the aforesaid amount of Rs.5,000/-.

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